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SUPREME COURT, U.S.

In The
Supreme Court of the United States

REYMUNDO TOLEDO-FLORES,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

REPLY BRIEF FOR PETITIONER

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ARGUMENT

I. MR. TOLEDO-FLORES'S CASE IS NOT MOOT.

In its brief (Resp. Br. 10-13), the Government contends that Mr. Toledo-Flores's case is moot. The Government is mistaken.

Central to the Government's mootness argument is the implicit, and erroneous, distinction it draws between Mr. Toledo-Flores's "now-completed sentence" (Resp. Br. 11) and his "term of supervised release." Resp. Br. 11. Contrary to the Government's distinction, Mr. Toledo-Flores received ***one*** sentence that had both an imprisonment component and a supervised release component.[1] And, although Mr. Toledo-Flores has served the imprisonment component of that sentence, he is still subject to the supervised release component, notwithstanding his deportation from the United States.[2] The district court retains jurisdiction to modify the terms and conditions of that supervised release throughout the supervised release period, *see* 18 U.S.C. § 3583(e)(2); and it retains jurisdiction to revoke that supervised release and to reincarcerate Mr. Toledo-Flores even after the supervised release term is over, provided that a violation warrant or summons issues

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[1] "[S]upervised release, while a form of post-imprisonment supervision, is still considered to be a component of the defendant's total sentence." *United States v. Gonzalez*, 250 F.3d 923, 928 (5th Cir. 2001) (citations omitted); *see also* 18 U.S.C. § 3583(a) ("The court, in imposing a sentence to a term of imprisonment for a felony or a misdemeanor, may include ***as a part of the sentence*** a requirement that the defendant be placed on a term of supervised release after imprisonment * * * * ") (emphasis added).

[2] As every circuit to have considered the question has held, a defendant's term of supervised release is not extinguished by the defendant's deportation. *See, e.g., United States v. Williams*, 369 F.3d 250, 253 (3d Cir. 2004) (so holding and citing cases from the Second, Fifth, Seventh, and Ninth Circuits as in accord).

prior to the expiration of the supervised release term. *See* 18 U.S.C. § 3583(e)(3) & (i). Mr. Toledo-Flores is thus still subject to the sentence that was the subject of his appeal and his petition to this Court.[3]

This Court has never held that an appeal of a sentence may become moot before that sentence is completely discharged. In this regard, the Government's reliance (Resp. Br. 11-13) on *Spencer v. Kemna*, 523 U.S. 1 (1998), is misplaced. In *Spencer*, the petitioner had attacked, in a federal habeas corpus proceeding, a state parole revocation proceeding and the resulting sentence. That sentence, however, completely expired before the federal district court could rule on his petition. This Court held that "***[o]nce the convict's sentence has expired***, [] some concrete and continuing injury other than the now-ended incarceration or parole * * * must exist if the suit is to be maintained." *Id.* at 7 (emphasis added). Finding no such injury, the Court affirmed the finding of mootness. *See id.* at 14-16. The Court found that any residual effect of the moribund parole revocation and sentence on a future revocation or future criminal sentencing to be insufficient to establish the requisite injury. *See id.* at 14-15.

Here, unlike in *Spencer*, Mr. Toledo-Flores is contesting a sentence that is still in effect and from which he may still suffer direct consequences, not just collateral

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[3] The Government is wrong when it asserts (Resp. Br. 10) that "[t]he sole relief sought in [Mr. Toledo-Flores's] appeal and petition to this Court was a reduction in the length of his sentence of imprisonment." Rather, in the court below, Mr. Toledo-Flores argued that, as a consequence of the error at issue here, the Court of Appeals "should vacate Mr. Toledo-Flores's sentence and remand for resentencing." Pet. C.A. Br. 15 (footnote omitted); *see also* Pet. C.A. Reply Br. 6 (same). And, in this Court, Mr. Toledo-Flores asked this Court to "grant certiorari to review the judgment of the Fifth Circuit," Pet. Cert. 18 – a judgment that affirmed the judgment of conviction and sentence entered by the district court. *See* Pet. Cert. 20.

consequences as in *Spencer*. And, the relevant precedent of this Court establishes that an appeal of a sentence is not moot while some portion of that sentence remains in effect and where the appeal can shorten or otherwise ameliorate that remaining portion of the sentence.[4]

The Government, however, would have this Court carve out an exception to this line of precedent to hold that, as a consequence of Mr. Toledo-Flores's deportation, his appeal of his still-in-effect sentence is moot. It would be incongruous to determine that the district court still has jurisdiction over Mr. Toledo-Flores's supervised release term, *see supra* text, at 1-2, but that the appellate courts lack jurisdiction to review the sentence containing that same supervised release term. And it would be unfair to determine that deportation does ***not*** extinguish Mr. Toledo-Flores's supervised release term, *see supra* text, at 1 n.2, but ***does*** extinguish his right to appellate review of

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[4] *Compare, e.g., Mabry v. Johnson*, 467 U.S. 504, 507 n.3 (1984) (where defendant claimed that he was entitled to enforcement of prosecutor's withdrawn plea offer to recommend that defendant's prison sentences run concurrently, case was not moot despite defendant's release on parole, because favorable decision would mean an earlier expiration of defendant's parole), *and Jago v. Van Curen*, 454 U.S. 14, 21 n.3 (1981) (*per curiam*) (defendant's claims of error respecting earlier denial of parole were not rendered moot by his later release on parole, where defendant remained on parole and where success on appeal could possibly result in release from, or termination of, parole), *with, e.g., Lane v. Williams*, 455 U.S. 624, 631 (1982) (defendants' attacks on their sentences were moot, where those sentences (including their parole terms) had completely expired), *and Weinstein v. Bradford*, 423 U.S. 147, 148 (1975) (*per curiam*) (defendant's attack on procedures used to determine his parole eligibility was moot where defendant had not only been subsequently paroled, but had also been completely released from supervision). *Cf. North Carolina v. Rice*, 404 U.S. 244, 248 (1971) (*per curiam*) (suggesting that defendant's attack on his completely-served sentence appeared to be moot, but remanding for determination of any collateral consequences attaching under state law to length of discharged sentence).

the sentence including that supervised release term. The Government offers no persuasive reason to justify such an incongruous and unfair result.

As an initial matter, Mr. Toledo-Flores could still benefit from a retrospective reduction of his prison term, even though he has completely served even the longer prison term imposed by the district court. As the Second Circuit has explained, the length of a prior prison sentence is an important consideration in the Attorney General's discretionary decision whether to grant a waiver of inadmissibility, under 8 U.S.C. § 1182(d)(3), to a person otherwise ineligible for a nonimmigrant visa. *See United States v. Hamdi*, 432 F.3d 115, 119-21 (2d Cir. 2005). Prevailing in this appeal would give Mr. Toledo-Flores the opportunity for a lower prison sentence, which, in turn, could improve his chances of securing a § 1182(d)(3) waiver and a nonimmigrant visa to enter the United States. *See id.*

But even if only Mr. Toledo-Flores's supervised release term is considered,[5] the Government is wrong when it suggests that the Guideline error in this case "had [no] effect on the length of his supervised release." Resp. Br. 11. "[T]he controlling statutes explicitly make the Guidelines computation relevant to [Mr. Toledo-Flores's] supervised release, which persists to this day[.]" *United States v. McCoy*, 313 F.3d 561, 564 (D.C. Cir. 2002) (*en banc*) (finding challenge to Guidelines computation not moot despite defendant's completion of her prison sentence). Particularly, 18 U.S.C. § 3583(c), entitled "Factors to be considered in including a term of supervised release," provides:

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[5] The Government is wrong when it asserts that Mr. Toledo-Flores "has never challenged the imposition of a term of supervised release * * * * *" Resp. Br. 11. As noted above, *see supra* text, at 2 n.3, Mr. Toledo-Flores argued below for the vacatur of his ***sentence*** – which, as discussed above, includes the term of supervised release – and not just his term of imprisonment.

> The court, in determining whether to include a term of supervised release, and, if a term of supervised release is to be included, in determining the length of the term and the conditions of supervised release, shall consider the factors set out in section 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D), (a)(4), (a)(5), and (a)(6).

18 U.S.C. § 3583(c). "The most obviously relevant cross-referenced section is § 3553(a)(4)(A), which refers to 'the applicable category of offense committed by the applicable category of defendant as set forth in the guidelines issued by the Sentencing Commission * * * * *'" *McCoy*, 313 F.3d at 564 (citation omitted). Therefore, notwithstanding his completion of the imprisonment component of his sentence, "[r]esentencing under a revised Guidelines computation clearly could benefit [Mr. Toledo-Flores]." *Id.*

Although, as the Government points out (Resp. Br. 11), up to one year of supervised release was authorized for Mr. Toledo-Flores's offense, the district court was not statutorily obliged to impose any supervised release term at all. *See* 8 U.S.C. § 1325(a); 18 U.S.C. § 3559(a)(5); 18 U.S.C. § 3583(a) & (b)(3). The district court could thus, on remand, resentence Mr. Toledo-Flores to less than one year of supervised release or no supervised release at all.[6] *See, e.g., United States v. Allen*, 434 F.3d 1166, 1170 (9th Cir. 2006) (finding that because "the district court could resentence Allen to a shorter term of supervised release in light of a shorter appropriate term of imprisonment or to no term of supervised release * * * [t]he length of the

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[6] The Government errs when, citing 18 U.S.C. § 3583(e)(1), it argues (Resp. Br. 12) that the district court cannot shorten Mr. Toledo-Flores's term of supervised release. Section 3583(e)(1) speaks only to a district court's ability to terminate a valid supervised release term; it does not purport to apply to the imposition of a supervised release term either at the initial sentencing or on resentencing after remand.

imprisonment sentence [was] therefore not moot" notwithstanding defendant's completion of his prison sentence) (citations omitted). This is therefore not a case where "an event occur[ring] while a case is pending on appeal" has "ma[de] it impossible for the court to grant any effectual relief whatever" to Mr. Toledo-Flores. *Church of Scientology of California v. United States*, 506 U.S. 9, 12 (1992) (internal quotation marks and citation omitted).

Moreover, while it is true that "erroneously served prison time is not to be [automatically] credited against a term of supervised release," Resp. Br. 11 (citing *United States v. Johnson*, 529 U.S. 53, 57-60 (2000)), such wrongful or excessive imprisonment is a factor that district courts may, in their discretion, permissibly consider in setting the length or conditions of supervised release on a remand for resentencing. *Cf. Johnson*, 529 U.S. at 60 (noting that wrongful incarceration may be equitable consideration militating in favor of modification or early termination of supervised release term). For all these reasons, "[Mr. Toledo-Flores's] unexpired term of supervised release, which could be reduced by a favorable appellate decision, is sufficient to defeat [the Government's] claim of mootness." *United States v. Castro-Rocha*, 323 F.3d 846, 848 n.1 (10th Cir. 2003) (citation omitted) (collecting cases); *see also, e.g., United States v. Lares-Meraz*, 452 F.3d 352, 355 (5th Cir. 2006) (defendant's appeal of sentence not moot, notwithstanding expiration of prison sentence and defendant's deportation to Mexico, where defendant remained subject to a term of supervised release that could be altered).

The Government next argues, however, that reversal of Mr. Toledo-Flores's sentence "would not have any practical effect on * * * his supervised release." Resp. Br. 11. Particularly, the Government argues (Resp. Br. 11-12) that, because Mr. Toledo-Flores has been deported, "[t]he term of supervised release thus has no effect on Toledo-Flores's

liberty and implicates no legally cognizable interest." Resp. Br. 12. The Government also argues that Mr. Toledo-Flores's supervised release term will assume significance only if he illegally enters the United States before that term expires – an illegal act that he is able, and required by law, to prevent. *See* Resp. Br. 12-13.

These arguments, however, ignore the fact that it is not impossible that Mr. Toledo-Flores could, under some circumstances, ***legally*** return to the United States within the supervised release term,[7] in which case he would be required to comply with every single condition of that supervised release, on pain of revocation and reincarceration. But, even in Mexico, Mr. Toledo-Flores "is still under the sentence of the District Court and on [supervised release] subject to conditions imposed by the District Court," violation of which will "subject [him] to imprisonment under his continuing criminal sentence." *United States v. Campos-Serrano*, 404 U.S. 293, 294 n.2 (1971).

Particularly, Mr. Toledo-Flores remains subject to a number of restrictive conditions of supervised release (*see* Resp. Br. 4a-7a) that require much more of him than simply not breaking the law. For example, he is required to "work regularly at a lawful occupation," to "refrain from excessive use of alcohol," and to refrain from "associat[ing] with any person convicted of a felony" without Probation Office permission. And, a violation of any of those conditions could subject Mr. Toledo-Flores to extradition,[8]

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[7] He could, for example, be paroled into the United States for "urgent humanitarian reasons or significant public benefit," 8 U.S.C. § 1182(d)(5)(A), including, for example, testifying in American court proceedings, *see* 8 C.F.R. § 212.5(b)(5); or he could be admitted on a nonimmigrant visa for the purposes of cooperating with federal or state law enforcement. *See* 8 U.S.C. §§ 1101(a)(15)(S)(i) & 1184(k).

[8] *See, e.g., United States v. Burke*, 425 F.3d 400, 407 (7th Cir. 2005) (noting that defendant was extradited from Great Britain to the United

(Continued on following page)

revocation of his supervised release, and reincarceration for up to one year, *see* 18 U.S.C. § 3583(e)(3), all "on the lesser showing needed to establish a [supervised release] violation than to prove a criminal offense." *Lane v. Williams*, 455 U.S. at 631; *see also* 18 U.S.C. § 3583(e)(3) (finding of supervised release violation may be made by a preponderance of the evidence). Mr. Toledo-Flores's continued subjection to a supervised release term entailing a number of restrictions on his otherwise lawful conduct, violation of which could result in reimprisonment, prevents this case from being moot.

In sum, as Judge Easterbrook has observed, "[u]nless we are confident that [Mr. Toledo-Flores] ***cannot*** benefit from success on appeal, the case is not moot." *United States v. Trotter*, 270 F.3d 1150, 1152 (7th Cir. 2001) (emphasis in original), *cert. denied*, 534 U.S. 1166 (2002); *see also id.* at 1152-53 (holding that appeal of sentence was not moot, despite expiration of prison sentence, where defendant remained on supervised release and "on remand [the] district court would have discretion to shorten the term of supervised release"). So long as Mr. Toledo-Flores's supervised release term remains in effect, he could benefit from an appellate remand giving the district court an opportunity to shorten, or to eliminate altogether, that supervised release term. Moreover, he could also benefit even from a retrospective reduction in the imprisonment

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States for violating the terms of his federal supervised release), *cert. denied*, 126 S. Ct. 2889 (2006); *cf., e.g., United States v. Lazerman*, No. 98-50339, 1999 WL 542876, at *2 (9th Cir. July 26, 1999) (unpublished) (upholding defendant's extradition from Canada to the United States for hearing on revocation of his federal probation); *McGann v. United States Board of Parole*, 488 F.2d 39, 40-41 (3d Cir. 1973) (upholding defendant's extradition from Jamaica to the United States for charged violations of federal parole), *cert. denied*, 416 U.S. 958 (1974).

term imposed for his offense. Mr. Toledo-Flores's case is therefore not moot.

II. MR. TOLEDO-FLORES'S PRIOR CONVICTION FOR SIMPLE POSSESSION OF 0.16 GRAMS OF COCAINE IS NOT AN "AGGRAVATED FELONY."

The question before the Court is whether Mr. Toledo-Flores's conviction for simple possession of 0.16 grams of cocaine, a felony under the law of Texas, is a conviction for "illicit trafficking in a controlled substance * * * including a drug trafficking crime (as defined in section 924(c) of Title 18)," thus making it an "aggravated felony" conviction under 8 U.S.C. § 1101(a)(43)(B). The Government makes no claim that Mr. Toledo-Flores's prior simple possession offense falls within the ordinary or legal meaning of "illicit trafficking in a controlled substance."[9] The Government likewise does not dispute that Mr. Toledo-Flores's prior possession offense would have been a misdemeanor under federal law. The question before the Court, therefore, reduces to this: in order to qualify as "a drug trafficking crime (as defined in section 924(c) of Title 18)," must an offense be one that is punishable as a federal felony under the three sets of statutes listed in 18 U.S.C. § 924(c)(2)? The answer to that question is "Yes."

If one assumes *arguendo* that the phrase "including a drug trafficking crime (as defined in section 924(c) of Title 18)" is not limited by the antecedent phrase "illicit trafficking in a controlled substance,"[10] the question then is how

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[9] In fact, as Mr. Toledo-Flores explained in his opening brief, *q.v.* at 15-16, simple possession of a controlled substance does ***not*** fall within the ordinary or legal meaning of the phrase "illegal trafficking in a controlled substance."

[10] But *see, e.g.*, Toledo-Flores Opening Br. 16-17; NYSDA Immigrant Defense Project Br. 6-20.

the term "drug trafficking crime" is defined in 18 U.S.C. § 924(c). The Government focuses primarily on 18 U.S.C. § 924(c)(2), which states that "the term 'drug trafficking crime' means any felony punishable under" the federal Controlled Substances Act ["CSA"] or two other groups of federal statutes. But, in order to get to its desired interpretation of the statute – namely, that an offense need only be punishable under the CSA and be designated as a "felony" by the jurisdiction of prosecution to qualify as a "drug trafficking crime" – the Government must resort to construing segments of § 924(c)(2) in isolation, in contravention of established principles of statutory construction requiring courts to examine statutes as a whole. *See, e.g., United States v. Morton*, 467 U.S. 822, 828 (1984) ("We do not, however, construe statutory phrases in isolation; we read statutes as a whole.") (footnote omitted).

First, the Government isolates the term "any felony" in § 924(c)(2), and argues that, because "'[r]ead naturally, the word "any" has an expansive meaning,'" Resp. Br. 19 (quoting *United States v. Gonzales*, 520 U.S. 1, 5 (1997)), the term "any felony" cannot logically be limited only to federal felonies, but must include state felonies as well. *See* Resp. Br. 19. But, as pointed out in Mr. Toledo-Flores's opening brief, *q.v.* at 13-15, the phrase "any felony" must be read in light of the long-standing presumption under *Jerome v. United States*, 318 U.S. 101, 104 (1943), that, absent some clear indication to the contrary, Congress is presumed not to make application of federal law dependent on state law. Indeed, in *Jerome*, the Court applied this presumption to hold that the very phrase at issue here – "any felony" – did not encompass state felonies that were not also federal felonies. *See Jerome*, 318 U.S. at 104 & 108; *cf. Small v. United States*, 544 U.S. 385, 388-94 (2005) (interpreting 18 U.S.C. § 922(g)(1)'s phrase "convicted in any court" in light of presumption against extraterritorial

application of United States laws and holding that phrase did not include foreign convictions).

In any event, contrary to the Government's argument (Resp. Br. 19), the term "any felony" does not stand alone. Rather, the term "any felony" is modified by the phrase "punishable under the [CSA and other federal acts]." In other words, here Congress ***did*** add "language limiting the breadth" of the phrase "any felony," *Gonzales*, 520 U.S. at 5, and that language is best read as limiting the phrase "any felony" in precisely the way argued by Mr. Toledo-Flores – as a felony under the specified federal laws.

The Government, however, repeats the error of reading parts of the applicable statute in isolation by focusing narrowly on the phrase "punishable under the" CSA, and arguing that this phrase "[s]ubstantively [d]escribes the [q]ualifying [c]riminal [c]onduct." Resp. Br. 24. The Government then patches together its interpretations of the phrases "any felony" and "punishable under the" CSA to reason that a "drug trafficking crime" under § 924(c)(2) includes "any felony" – *i.e.*, any offense under federal or state law that carries a maximum prison sentence exceeding one year – "punishable under the" CSA – *i.e.*, describing conduct that is punished under the CSA (whether as a felony or as a misdemeanor). *See* Resp. Br. 23.

The problem for the Government is that the most natural interpretation of the phrase "any felony punishable under the" CSA, when taken as a whole, is radically different from the meaning arrived at through the Government's piecemeal approach to § 924(c)(2). It is not just "any felony" that qualifies as a "drug trafficking crime"; it is "any felony punishable under the" CSA. In turn, § 924(c)(2) does not say "any felony ***describing conduct*** punishable under the" CSA; rather, the phrase "punishable under the" CSA is directly attached to, and hence

"modifie[s] * * * and * * * restrict[s]," *Lewis v. United States*, 445 U.S. 55, 60 (1980), the term "any felony."

In fact, the most natural meaning of the phrase "any felony punishable under the" CSA, taken as a whole, is any offense that is punishable as a felony under the CSA. *See* Toledo-Flores Opening Br. 22-26. As Judge Posner has observed, the fact that the term "felony" in isolation may refer to either a federal felony or a state felony

> doesn't imply, however, that a state felony is ***punishable*** under the Controlled Substances Act. State crimes, as distinct from the acts constituting the crimes, are not usually punished by federal law. Federal law punishes bank robberies, as does state law; but the federal bank robbery statute does not say that anyone who is convicted of bank robbery in state court is guilty of a federal offense. 18 U.S.C. § 2113. The Controlled Substances Act does not purport to punish state drug felonies * * * *

Gonzales-Gomez v. Achim, 441 F.3d 532, 534 (7th Cir. 2006) (emphasis in original).

In addition to misreading § 924(c)(2), the Government focuses too narrowly on that subsection alone, glossing over the fact that 8 U.S.C. § 1101(a)(43)(B) does not refer to "drug trafficking crime[s] (as defined in section 924(c)***(2)***)," but rather refers more globally to "drug trafficking crime[s] (as defined in section 924(c))." As pointed out in Mr. Toledo-Flores's opening brief, *q.v.* at 19-22, § 1101(a)(43)(B)'s global reference to § 924(c) as a whole leaves no doubt that the term "drug trafficking crime" in § 1101(a)(43)(B) is meant to refer only to drug felonies "for which the person may be prosecuted in a court of the

United States," 18 U.S.C. § 924(c)(1)(A) – *i.e.*, federal drug felonies.[11]

The Government attempts to minimize the significance of the reference to § 924(c) as a whole by asserting conclusorily that "only Section 924(c)(2) ***defines*** 'drug trafficking crime'" (Resp. Br. 21) (emphasis in original) and that "Subsection (c)(1) * * * is not a definitional section." Resp. Br. 21-22. The Government claims that "if Section 924(c)(2) had the federal-felony limitation that petitioners posit, there would have been no reason for Congress separately to require that the drug trafficking crime be subject to federal prosecution in federal court before it will support a [§] 924(c)(1) federal prosecution." Resp. Br. 22 (footnote omitted). But the Government refutes its own argument when it points out (Resp. Br. 22 n.15) (1) that this language was necessary to make sure that only federal "crimes of violence" could serve as predicate offenses under § 924(c)(1)(A); and (2) that the "prosecut[able] in a court of the United States" limitation preceded the addition of "drug trafficking crimes" to § 924(c).

Finally, the Government argues (Resp. Br. 13, 15-16, 22, 31, 42, 45) that even if 18 U.S.C. § 924(c), standing alone, requires an offense that is a federal felony, the penultimate sentence of 8 U.S.C. § 1101(a)(43)[12] also sweeps in state felony offenses. That interpretation flounders under a plain reading of the statute. Section 1101(a)(43)(B) describes the type of offenses that are

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[11] Of course, for purposes of § 924(c), these drug felonies need not actually be prosecuted in federal court (or prosecuted anywhere, for that matter); they need only be federally ***prosecutable*** as felonies.

[12] That sentence reads, in relevant part: "The term ['aggravated felony'] applies to an offense described in [§ 1101(a)(43)] whether in violation of Federal or State law * * * * *".

aggravated felonies – for purposes of the instant case, offenses that are punished as felonies under the federal Controlled Substances Act. The penultimate sentence of § 1101(a)(43) does not alter the ***description*** of these offenses; rather, it simply assures that offenses fitting this description will be included "whether in violation of Federal or State law." In other words, the function of the penultimate sentence of § 1101(a)(43) is merely to assure that offenses of the type described in § 1101(a)(43)(B) will count as "aggravated felonies" regardless of the jurisdiction – federal, state, or (sometimes) foreign – in which they are prosecuted. Indeed, the legislative history behind the addition of that sentence reflects that this was its purpose. *See United States v. Ibarra-Galindo*, 206 F.3d 1337, 1343-44 (9th Cir. 2000) (Canby, J., dissenting) (discussing that legislative history and making this same point), *cert. denied*, 531 U.S. 1102 (2001).

The Government also disputes (Resp. Br. 40-42) the relevance of the legislative history discussed by Mr. Toledo-Flores in his opening brief, *q.v.* at 30-37. Having thoroughly discussed that legislative history there, Mr. Toledo-Flores will not repeat that discussion here. One point does, however, require some response.

The Government concedes (Resp. Br. 40) that the 1988 legislation changing the definition of "drug trafficking crime" from "any felony violation of Federal law involving the distribution, manufacture, or importation of any controlled substance" to its present text was, according to the legislative history, meant to be a "clarification." The Government then argues, however, without citation to any legislative history, that it was not just a "clarification" of the prior law, but rather a radical expansion of the offenses that could qualify as a "drug trafficking crime" under § 924(c). (Resp. Br. 40-41).

Had Congress intended to make such a radical change in the law, one would expect at least some indication in the legislative history to that effect;[13] but the Government points to none. Indeed, the Government points (Resp. Br. 42-43 & n.33) to no legislative history supporting its view, save for some very general remarks by single legislators – the very least persuasive of all types of legislative history[14] – and the testimony of witnesses at congressional hearings, which of course sheds no light on the thinking of Congress at all. For all these reasons, the phrase "drug trafficking crime (as defined in section 924(c) of Title 18)" is best read to mean an offense that ***could be*** prosecuted as a federal felony under the three acts listed in § 924(c)(2).[15]

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[13] *See, e.g., Sale v. Haitian Centers Council, Inc.*, 509 U.S. 155, 176 (1993) ("It would have been extraordinary for Congress to make such an important change in the law without any mention of that possible effect. Not a scintilla of evidence of such an intent can be found in the legislative history.").

[14] "The remarks of a single legislator, even the sponsor, are not controlling in analyzing legislative history." *Chrysler Corp. v. Brown*, 441 U.S. 281, 311 (1979); *accord Consumer Prod. Safety Comm. v. GTE Sylvania*, 447 U.S. 102, 118 (1980); *see also Garcia v. United States*, 469 U.S. 70, 76 (1984) ("We have eschewed reliance on the passing comments of one Member, and casual statements from the floor debates.") (citations omitted).

[15] The Government suggests that this approach "would harm other aliens who, for example, were convicted of an offense that is a misdemeanor under state law, but a felony under federal law, either in its own right or due to a recidivist provision." Resp. Br. 48. But, if the jurisprudence is any indication, there are probably relatively few crimes that are state-law misdemeanors but federal felonies. Moreover, even if "drug trafficking crime[s] (as defined in [18 U.S.C. § 924(c)(1)])" may, standing alone, be state-law misdemeanors that correspond to federal felonies, the language of 8 U.S.C. § 1101(a)(43) – namely, the fact that it refers to aggravated ***felonies*** – in conjunction with the requirement under both immigration and criminal law that a person have been ***convicted*** of the aggravated felony, *see* 8 U.S.C. §§ 1227(a)(2)(A)(iii), 1326(b)(2); U.S. SENTENCING GUIDELINES MANUAL ("USSG") § 2L1.2(b)(1)(C), may prohibit

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The Government's policy-based arguments fare no better than its textual or legislative history arguments. The Government argues (Resp. Br. 38-39) that its reading of the statute (the State Felony Approach) is bolstered by the fact that, unlike the federal system, "[a] number of States * * * establish a graduated system of penalties for possession, under which possession of trafficking-level amounts of a controlled substance are subject to the same type of severe penalties as federal trafficking offenses, even though the offense of conviction remains denominated 'possession.'" Resp. Br. 39. The Government fails to note, however, that these sorts of possession statutes may sit side-by-side with more traditional trafficking-type statutes, which would indubitably qualify as "drug trafficking crimes" under § 924(c). *Compare, e.g.*, TEX. HEALTH & SAFETY CODE § 481.121(b)(5) (possession of more than 50, up to 2000, pounds of marijuana is a second-degree felony), *with* TEX. HEALTH & SAFETY CODE § 481.120(b)(5) (delivery of same quantity of marijuana a first-degree felony). But, regardless of whether the decision to prosecute an individual under one of these sorts of possession statutes is an individual prosecutorial decision, or an across-the-board state legislative decision, those decisions by state actors are no excuse for distorting the plain words of the statutory scheme at issue here.

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the attachment of the "aggravated felony" label to an offense that was only a misdemeanor (*i.e.*, punishable by no more than one year's imprisonment) under the law of the jurisdiction that prosecuted it. *See* American Bar Association Br. 10-13.

In any event, this case does not require this Court to decide that question. It is enough for this Court to hold that application of 8 U.S.C. § 1101(a)(43)(B)'s "drug trafficking crime" prong requires conduct that is proscribed as a felony by federal law. Whether aggravated felony status may attach based on a misdemeanor conviction for conduct that is a felony under federal law is a question that should be left for another day.

Moreover, to deny "aggravated felony" status even to these sorts of possession offenses does not leave the Government without effective tools in either the immigration context or the criminal law context. Possession of any controlled substance other than less than thirty grams of marijuana, even if not an "aggravated felony," is an offense "relating to a controlled substance" that is a separate basis for removal from the United States. *See* 8 U.S.C. § 1227(a)(2)(B)(i). And, the underlying facts of the offense may be considered in the decision whether the immigrant is entitled to discretionary relief from removal. *See, e.g., Gouveia v. INS*, 980 F.2d 814, 817 (1st Cir. 1992) (noting that, in order to assess whether it is appropriate to grant discretionary relief from deportation, "the nature and the gravity of the conviction(s) undergirding the deportation proceedings must be scrutinized * * * [and] a judge must necessarily be free to inquire into the circumstances surrounding the commission of the crime(s)"). Likewise, in the criminal law context, even if an alien is not subject to an eight-level "aggravated felony" enhancement under USSG § 2L1.2(b)(1)(C) for his simple possession conviction, a federal sentencing court can, under *United States v. Booker*, 543 U.S. 220 (2005), take the underlying facts of the offense into account insofar as those facts are relevant to the various sentencing factors of 18 U.S.C. § 3553(a).

The Government also asserts (Resp. Br. 31-33) that the Federal Felony Approach would be too difficult to administer in practice. Of course, in Mr. Toledo-Flores's case, it is perfectly clear that his prior offense (simple possession of 0.16 grams of cocaine) is ***not*** a federal felony. In any event, the Government's concerns are exaggerated. The process of comparing a state offense to those offenses proscribed as felonies under the federal acts listed in § 924(c)(2) is no more difficult than the very similar comparative process mandated by this Court in *Taylor v. United States*, 495 U.S. 575 (1990), for determining

whether a state offense qualifies as burglary for purposes of sentence enhancement under 18 U.S.C. § 924(e). *See Taylor*, 495 U.S. at 599-602; *see also Shepard v. United States*, 544 U.S. 13, 16, 19-23, 26 (2005) (applying *Taylor* in scenario where prior conviction resulted from guilty plea rather than from jury trial). Federal courts are perfectly capable of resolving any questions arising at the margins from application of the Federal Felony Approach (*e.g.*, with respect to second or subsequent state possession convictions). *See, e.g., Gerbier v. Holmes*, 280 F.3d 297, 316-18 (3d Cir. 2002) (addressing such a question). Moreover, in criminal cases, the Federal Felony Approach has the virtue of assuring that an "aggravated felony" sentencing enhancement will be applied uniformly on the basis of the same conduct regardless of the label or the punishment that a particular State attaches to that conduct – precisely the same consideration that led this Court to adopt a uniform federal definition of "burglary" in *Taylor*. *See Taylor*, 495 U.S. at 590-92.

Finally, the Government asserts (Resp. Br. 48-49) that there is no "grievous ambiguity" triggering the rule of lenity in this case. Although a division of authority among lower courts on the interpretation of a statute is not "***automatically*** sufficient to trigger [application of the rule of] lenity," *Moskal v. United States*, 498 U.S. 103, 108 (1990) (emphasis added; footnote omitted),[16] here the number of thoughtful, well-reasoned opinions supporting application of the Federal Felony Approach show, at a minimum, that the Government's position is not "unambiguously correct," thus requiring the Court to "apply the rule of lenity and resolve the ambiguity in [petitioners']

[16] The Court explained that "[i]f that were sufficient, one court's unduly narrow reading of a criminal statute would become binding upon all other courts, including this one." *Id.*

favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994).[17]

In sum, the plain text of the statutes at issue indicates that Congress intended to adopt the Federal Felony Approach. This interpretation is supported by the legislative history, and furthers the important interest of uniformity of application of both immigration and federal criminal law. And, even if a contrary reading of the statutes were possible, that contrary reading is, at a minimum, not unambiguously correct, thus requiring application of the Federal Felony Approach in Mr. Toledo-Flores's case under the rule of lenity.[18] Because the Fifth

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[17] The Government argues (Resp. Br. 48) that "even if applicable, the rule of lenity would not point in any particular direction in this case," because the Federal Felony Approach advocated by petitioners would not be the most lenient approach for certain other persons to whom these statutes might apply. This argument is, however, firmly rebutted by *Granderson* itself, in which the Government argued, and this Court agreed, that, for the particular ambiguous statute at issue in that case, the rule of lenity would compel a different interpretation of the statute for certain defendants than the interpretation given to the statute by the Court for the particular petitioner in that case. *See Granderson*, 511 U.S. at 57 n.15. *Granderson* thus stands for the proposition that the rule of lenity is defendant-specific; and that where a statute is ambiguous, it must be given the interpretation most beneficial to the particular defendant under consideration.

[18] That the Government's interpretation is, at a minimum, not unambiguously correct is also demonstrated by a contrary interpretation of 18 U.S.C. § 924(c)(2) by another agency within the United States Department of Justice itself. The Federal Bureau of Prisons ("BOP") is required, under 18 U.S.C. § 4042(b)(1), to alert state and local law enforcement officials of the imminent release from federal custody of a prisoner convicted of "a drug trafficking crime, as that term is defined in section 924(c)(2)[.]" 18 U.S.C. § 4042(b)(3)(A). And, for purposes of this directive, the BOP defines the term "drug trafficking crime" as follows: "Any current or prior felony offense under 21 U.S.C. § 801 through § 863 (inclusive), 21 U.S.C. § 951 through § 971 (inclusive), or 46 U.S.C. App. § 1903 (see 18 U.S.C. § 924(c)(2))." Federal Bureau of Prisons Program Statement 5110.15 (Aug. 30, 2000), § 8(a), available at http://www.bop.gov/policy/progstat/5110_015.pdf (last visited Sept. 17,

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Circuit thus erred in applying the State Felony Approach in deciding Mr. Toledo-Flores's case, this Court should reverse the judgment of the Fifth Circuit.

CONCLUSION

The judgment of the United States Court of Appeals should be reversed.

Respectfully submitted,

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2006). The BOP's definition of "drug trafficking crime" is consistent with the Federal Felony Approach, not the State Felony Approach.